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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975
No. 74-1222

CHARLES L. WOLFF, JR., Warden,
Nebraska Penal and
Correctional Complex,

Petitioner,

vs.

DAVID L. RICE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

Brief of the State of Arizona as Amicus Curiae in Support of Petitioner

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Interest of Amicus Curiae

The State of Arizona files this amicus brief pursuant to Rule 42(4) of the Rules of the Supreme Court of the United States. Of the several questions presented for review by petitioner, two vitally and immediately interest the State of Arizona. Amicus, in attempting to aid this Honorable Court in its resolution of these two questions, seeks a result which (1) would limit the applicability of the exclusionary rule to situations where a Fourth Amendment violation is committed by law enforcement officers who had knowledge, or may properly be charged with knowledge, that the search was unconstitutional; and (2) would limit the inquiry of federal

district courts on habeas corpus review of a state prisoner's Fourth Amendment claims to the question of whether the defendant was provided a fair opportunity in the state courts to raise and have adjudicated the Fourth Amendment claim.

The State of Arizona's vital interest in proper resolution of these two constitutional problems is to help this Honorable Court strike a proper balance between protecting the Fourth Amendment rights of all citizens, and protecting society from the ever-increasing havoc wrought by the lawless among us.

Amicus' immediate interest in a proper resolution of these two constitutional problems is to have this Honorable Court's decision herein mandate a reversal by the United States Court of Appeals for the Ninth Circuit of an order by the United States District Court for the District of Arizona granting the petition for a writ of habeas corpus of Arizona state prisoner Robert Tate Kasold, a convicted rapist and child molester. Acting on behalf of Warden Harold J. Cardwell, the State of Arizona has appealed the district court's order to the United States Court of Appeals. Among the issues being raised in *Kasold v. Cardwell*, Court of Appeals No. 75-2329, are the two exclusionary rule questions being considered in *Wolff v. Rice*.

The brief of amicus will not attempt to present to this Honorable Court the legal arguments which have been made by petitioner. Amicus will instead endeavor to demonstrate to this Honorable Court the injustices suffered by society as a result of the indiscriminate application of the exclusionary rule and the unlimited review of Fourth Amendment claims by federal district courts. Thus, amicus presents the case of Robert Tate Kasold.

Summary of Arguments

I

Dissatisfaction with the present-day applications of the exclusionary rule is misdirected at this Court's decision in *Mapp v. Ohio*, 367 U.S. 643 (1961). It is the courts inferior to this who have ignored the basic principles of *Mapp* and who have ignored this Court's discussions of the purposes of the exclusionary rule. The case of *Kasold v. Cardwell* provides a graphic example of how *Mapp* has been stood on its head: the federal district court invoked the exclusionary rule on collateral review despite explicitly finding that there existed *no evidence of police misconduct*. This complete convolution of the *Mapp* holding must be corrected. Amicus urges that this Court hold that the exclusionary rule should be invoked only if the police had knowledge, or could properly be charged with knowledge, that they were conducting a search in violation of the Fourth and Fourteenth Amendments.

II

For the reasons set forth in the concurring opinion of Mr. Justice Powell in *Schneckloth v. Bustamonte*, 412 U.S. 218, 250 (1973), this Honorable Court should overrule its decision in *Kaufman v. United States*, 394 U.S. 217 (1969). The case of Robert Tate Kasold brings sharply into focus how the federal district courts have come to dominate certain aspects of state criminal proceedings, and how federal habeas corpus often devolves into nothing more than a mere substitution of the personal viewpoint of a solitary district judge for that of an entire state judicial system's legal conclusions.

Also, the invocation of the exclusionary rule in a

collateral federal proceeding cannot possibly deter police misconduct. Furthermore, determinations of when the imperative of judicial integrity is violated in the state courts are not within the purview of the federal courts. Therefore, *Kaufman* is no longer viable.

ARGUMENT

I

Inferior State and Federal Courts Have Lost Sight of the Bases of This Court's Holding in *Mapp v. Ohio*, 367 U.S. 643 (1961). Neither *Mapp* Nor Its Progeny Have Ever Required a Rigid and Unthinking Application of the Exclusionary Rule. By Their Indiscriminate Application of the Exclusionary Rule, the Inferior Courts Have Come Full Circle and Are Presently Serving Neither to Deter Police Misconduct Nor to Preserve the Imperative of Judicial Integrity. The Case of Robert Tate Kasold Amply Demonstrates This Complete Convolution of Both the Intent and Underlying Rationale of *Mapp*.

Dissatisfaction with the present application of the exclusionary rule is rampant, and this Honorable Court's decision in *Mapp v. Ohio*, 367 U.S. 643 (1961) is the primary focus of the wrath vented by police, prosecutors, press and public alike. But is *Mapp v. Ohio* the real culprit? Or, have those courts who are charged with applying this Court's decisions completely lost sight of *Mapp's* holding? Amicus believes it is the latter and invites this Court to use *Wolff v. Rice* as a vehicle to instruct the state and federal courts that they have not heeded much of what this Court has said of the exclusionary rule.

A brief examination of *Mapp* and certain of its progeny is in order. The *Mapp* Court — citing *Elkins v. United States*, 364 U.S. 206, 217, 222 (1960) — offered two basic rationale in "holding that the exclusionary rule is an essential part of both the Fourth and Fourteenth Amendments": deterrence of police misconduct, and

"the imperative of judicial integrity." *Mapp v. Ohio*, 367 U.S. at 656-659.[1] Amicus submits that the *Mapp* majority would not have grounded its decision upon these two specifically enumerated reasons if it had not intended the exclusionary rule to be applied only in furtherance of the rule's aims. Indeed, *Mapp* seems to indicate as much: the Court stated that while "[i]n some cases" a criminal would go free, "the class of state convictions possibly affected by this decision is of relatively narrow compass * * *." 367 U.S. at 659. That relatively narrow compass of cases affected by *Mapp* never came to pass; the criminal justice system instead finds itself in a self-imposed straight jacket. Amicus suggests that this result has obtained because the courts have lost sight of *Mapp's* underpinnings and have ignored this Court's carefully delineated dissertations on the exclusionary rule.

While it is true that neither *United States v. Calandra*, 414 U.S. 338 (1974), nor *Michigan v. Tucker*, 417 U.S. 433 (1974), nor *United States v. Peltier*, 43 L.W. 4918 (1975) undertake a full scale reexamination of the present application of *Mapp v. Ohio*, in each case this Honorable Court was presented with a claim by the respective criminal defendants that the imposition of the exclusionary rule was warranted in their cases. In deciding each case, the Court undertook an examination of each claim in light of the purposes of the rule.

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[1] A long line of this Court's decisions have reaffirmed one or both of these two rationale. *E.g. Linkletter v. Walker*, 381 U.S. 618 (1965); *Terry v. Ohio*, 392 U.S. 1 (1967); *Lee v. Florida*, 392 U.S. 378 (1968); *Alderman v. United States*, 394 U.S. 165 (1969); *United States v. Calandra*, 414 U.S. 338 (1974); *Michigan v. Tucker*, 417 U.S. 433 (1974); *United States v. Peltier*, 43 L.W. 4918 (1975); *Brown v. Illinois*, 43 L.W. 4937 (1975).

In *Calandra*, the Court held that:

> "The purpose of the exclusionary rule is not to redress the injury to the privacy of the search victim:
>
> '[T]he ruptured privacy of the victims' homes and effects cannot be restored. Reparation comes too late.' Linkletter v. Walker, 381 U.S. 618, 637 (1965).
>
> Instead, the rule's prime purpose is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable search and seizures:
>
> 'The rule is calculated to prevent, not to repair. Its purpose is to deter — to compel respect for the constitutional guaranty in the only effectively available way — by removing the incentive to disregard it.' Elkins v. United States, 364 U.S. 206, 217 (1960).
>
> In sum, the rule is a judicially-created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." 414 U.S. at 347-348.

The Court ultimately decided that application of the rule to grand jury proceedings "would achieve a speculative and undoubtedly minimal advance in the deterrence of police misconduct * * *." 414 U.S. at 351-352.

In a Fifth Amendment context, the *Tucker* Court was called upon to decide, *inter alia*, whether the police's pre-Miranda failure to advise Tucker of his right to appointed counsel justified application of the exclusionary rule. The Court stated that:

> "The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in wilful, or at the very least, negligent conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instil in those particular investigating officers, or in their future counterparts, a greater degree of care towards the right of an accused. Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force." 417 U.S. at 447.

Finding good faith conduct on the part of the police, the Court held that the exclusionary rule was not applicable in *Michigan v. Tucker*.

Most recently, in *United States v. Peltier*, supra, this Court was urged to hold that its decision in *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973) was to be applied retroactively. In considering the problem, the decision cites the above-quoted portions of *Calandra* and *Tucker*, and concludes:

> "If the purpose of the exclusionary rule is to deter unlawful police conduct, then evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment. Admittedly this uniform treatment of roving border patrol searches by the federal judiciary was overturned by this Court's decision in *Almeida-Sanchez*. But in light of this history and of what we perceive to be the purpose of the exclusionary rule, we conclude that

nothing in the Fourth Amendment, or in the exclusionary rule fashioned to implement it, requires that the evidence here be suppressed, even if we assume that respondent's Fourth Amendment rights were violated by the search of his car." 43 L.W. at 4922.

Amicus has discussed the dual rationale of *Mapp* and has set out these lengthy quotes from *Calandra, Tucker* and *Peltier* solely to demonstrate that the Supreme Court of the United States has never advocated a *per se* application of the exclusionary rule. See *Terry v. Ohio*, 392 U.S. 1 (1967). It is abundantly clear that before any court invokes the exclusionary rule, it must determine whether or not the rule's purpose will be served. Yet, an examination of how the exclusionary rule is now being applied by American courts clearly indicates that these courts have completely lost sight of the purpose of the rule. The case of Robert Tate Kasold presents such an example. [For a complete rendition of the *Kasold* case, see the opinions of the Supreme Court of Arizona, reported as *State v. Kasold*, 110 Ariz. 558, 521 P.2d 990 (1974) and 110 Ariz. 563, 521 P.2d 995 (1974), attached to this brief as Appendices A and B.]

School authorities at North High School, Phoenix, Arizona initiated the police investigation of Kasold. They had received reports that Kasold, a teacher at the school, was involved in sexual activity with female students, the exact extent of which was unknown. They also reported that Kasold had been previously referred by the school district for psychological counseling because of complaints of over-familiarity with students.

A Phoenix police officer interviewed the two students, both of whom were under 18 years of age. The girls told

of acts of intercourse as well as fellatio and other lewd acts made at Kasold's suggestion. They related that Kasold took many photographs of these activities by means of a timing device; and that he was fond of these photographs and kept them to look at for his own sexual stimulation. One student told the officer that it was highly unlikely petitioner would destroy the photographs, because of his habits of masturbating while viewing them.

The two girls' information was promptly verified by polygraph examination. At this point, the police applied for a search warrant for Kasold's apartment, giving sworn oral testimony before the magistrate as well as summarizing the investigation in the affidavit for the search warrant.

The acts of Kasold with the two girls took place during a three-month period ending in July, 1972. Their disclosure to school authorities was made in late December, 1972, approximately five months later. The police investigation was completed in a few days, culminating in the appearance before the magistrate on January 2, 1973. During this five-month period Kasold had moved from the trailer where the sexual acts took place to a Phoenix apartment. All of the time factors were revealed to the magistrate.

As a result of the search warrant, police officers seized a large number of explicit sexual photographs of Kasold, the two girls, and others, pornographic books and questionnaires given to students by Kasold, and a roll of undeveloped film. The roll of film was developed and contained photographs of Kasold and a small child, later identified as the seven-year-old retarded daughter of a neighbor. Kasold was sexually exposed in the film,

and was engaging in acts within the scope of child molestation. Ariz. Rev. Stat. Ann. § 13-653.

The fruits of the search warrant were not introduced at the trial of petitioner for second degree rape. The state did, however, introduce the material in a lengthy mitigation/aggravation hearing.

The roll of film was the basis for Kasold's conviction for child molestation, in a second prosecution. The retarded seven-year-old victim was for all practical purposes mute and unable to testify at trial. The photographs with some foundational material were the sole evidence introduced by the state in this case. The Supreme Court of Arizona described the photographs:

> "The photographs show the defendant and the neighbor girl in various poses, one in which the little girl is watching cartoons on TV while the defendant is kneeling behind her fondling his private parts. There are three photographs of the little girl seated on the floor in the defendant's living room while the defendant stands over her and appears to be masturbating. Three photographs have them seated next to each other on the couch with the defendant's private parts exposed through his open fly. During all of this time the defendant was dressed in a pair of cutoff shorts. Two photographs show the defendant seated on the floor near the couch with his private parts exposed and the defendant appears to be rubbing the private parts of the little girl, although the little girl is dressed and the defendant has his hand on her shorts. Three other photographs show the little girl standing on her head with her legs spread apart and the defendant standing above her with his penis pointed to, but not

> touching, her private parts or clothing. The last photograph in the evidence shows the defendant with his pants around his knees, his private parts exposed, and the little girl doing a headstand in front, facing backwards, and he is holding her legs spread apart. In all of the photographs the victim is clothed." *State v. Kasold,* 110 Ariz. 558, 559, 521 P.2d 990, 991 (1974).

Kasold was convicted of six counts of second degree rape and one count of child molestation. He was sentenced to fifteen years to life for each count of rape, to be served concurrently, and twenty years to life for the child molestation. He is at present incarcerated in the Arizona State Prison. The Arizona Supreme Court affirmed the convictions. *State v. Kasold,* 110 Ariz. 558, 521 P. 2d 990 (1974); *State v. Kasold,* 110 Ariz. 563, 521 P.2d 995 (1974); Appendices A and B.

Following the affirmance of his convictions, Kasold petitioned the United States District Court for the District of Arizona for a writ of habeas corpus, pursuant to 28 U.S.C. § 2254. An evidentiary hearing was held on April 7, 1975.

In its order of April 29, 1975, the district court granted the writ of habeas corpus, vacating the conviction for child molestation and ordering Kasold to be resentenced on the statutory rape convictions. The court found, contrary to the previous determination of the Arizona Supreme Court, that the magistrate did not have facts to determine that the photographs still existed and were in Kasold's possession, that a reasonable person would not believe that the photographs went with Kasold to his new apartment, and that the affidavit did not support a finding that a continuous course of conduct between

Kasold and his students could still exist (Order of April 29, 1975, at 9; see Appendix C).

The anomalous result obtained in the case of Robert Tate Kasold could be more easily digested if one could point to the district court's order setting aside Kasold's conviction and see that the legitimate and important concern for deterring police misconduct were being served. However, the district court did not offer that salve to the seven-year-old retarded victim nor to the citizens of Arizona. Instead, the court invoked the exclusionary rule despite finding the police blameless:

> "The parties have agreed that the police did not sit on the information once received. The police acted with dispatch in securing a warrant when they were given the information. *Thus, there is no allegation or evidence of police misconduct.*" (Order of April 29, at 6, see Appendix C.) (Emphasis added.)

Again, an examination of the district court's decision in *Kasold* reveals no discussion of the possible application of the exclusionary rule in light of its deterrent purpose. *Kasold* presents yet another example of a court being cognizant only of *Mapp's* holding that the exclusionary rule is applicable to the states, but totally ignoring the reasons this Court held the exclusionary rule constitutionally required. The district court's order in *Kasold* further indicates an abject ignorance of this Court's discussions of the exclusionary rule in *Calandra* and *Tucker*. (*Peltier* was not decided until two months after the *Kasold* decision.)

Amicus refers the Court to two recent examples of United States Courts of Appeals ignoring *Mapp's* rationale and exhibiting a gross ignorance of the *Calandra, Tucker* and *Peltier* holdings. These two cases are

United States v. Acosta, 501 F.2d 1330 (5th Cir. 1974), decision after rehearing en banc, 509 F.2d 539 (5th Cir. 1975), and the instant case below, *Rice v. Wolff*, 513 F.2d 1280 (8th Cir. 1975).

In *Acosta*, the majority summarily rejected the dissenting opinion of Circuit Judge Gee, who advocated applying the exclusionary rule only when the objective of deterring police misconduct would be served. And in the instant case, the Eighth Circuit declined to apply *Tucker's* pertinent statements concerning the exclusionary rule. In refusing to act, both courts stated that they were unable to do so because *Mapp* had not been overruled. While it is true that *Mapp* has not been overruled, each court completely ignored the fact that *Mapp* is grounded upon the theory that the exclusionary rule is required to deter the unlawful invasion of Fourth Amendment rights by the police. It is submitted, therefore, that the positions of Judge Gee in *Acosta* and of amici in *Rice v. Wolff* do not require any reversal of *Mapp*, but are instead implicit within its holding. *Cf. Harris v. New York*, 401 U.S. 222, 225 (1971).

Turning once again to the *Kasold* decision, it is not only an example of a court failing to discuss exclusion in light of the rule's deterrent purpose, it also fails to consider the secondary theory of judicial integrity. Assuming that the principles of judicial integrity still function as underpinning for the exclusionary rule,[2] it is important to trace the development of that principle.

In *Olmstead v. United States*, 277 U.S. 438 (1928), the government's wiretap was clearly in violation of the

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[2]Schrock and Welsh, *Up From Calandra: The Exclusionary Rule as a Constitutional Requirement*, 59 Minn.L.Rev. 251, 272, 277 (1974) (hereinafter cited as Schrock).

relevant state statute. According to the famous dissent of Mr. Justice Brandeis, by accepting the fruits of an avowedly criminal act, the court ratified the act and thereby assumed moral responsibility for that crime. The court would not condone such action on the part of a civil litigant, and should not condone such illegality on the part of the government agents. By accepting its fruits, the judicial process is contaminated; respect for the law is undermined, and the people cannot have confidence in the administration of justice. *Olmstead v. United States*, supra, 277 U.S. at 483-484. (Brandeis, J., dissenting.)

Amicus submits that the pure and idealistic rationale of judicial integrity as set forth in *Olmstead, Elkins v. United States*, 364 U.S. 206 (1960); *McNabb v. United States*, 318 U.S. 332 (1943); *Terry v. Ohio*, supra; and *Mapp v. Ohio*, supra; has led to the bankruptcy of this ideal when the exclusionary rule is indiscriminately applied in instances in which police officers did not act with disregard for constitutional rights. The ultimate, and absurd, result is apparent in the case of Robert Tate Kasold. There the United States District Court explicitly found no police illegality, and instead commended those officers for the level of their investigation. Hence the court was never asked to become an "accomplice in wilful disobedience of law," *McNabb v. United States*, supra, 318 U.S. at 385; *Lee v. Florida*, 392 U.S. at 386.

Amicus submits that before the "unclean hands" doctrine should be activated, there should be present at least a modicum of police misconduct, of harrassment, or of reckless disobedience to the laws of the United States and to the charter upon which this country was founded, *Mapp v. Ohio*, 367 U.S. at 659. Absent the taint of "illegality", amicus submits that the rigid and monolithic application of the exclusionary rule is unnecessary,

based upon this rationale. Restrained police conduct within legitimate investigative guidelines does not require the radical operation of exclusion. *Cf.* the street encounter in *Terry v. Ohio*, 392 U.S. at 15.

Amicus further submits that the judicial integrity rationale in those instances in which little or no deterrent effect can be expected, is, in fact, sullied when the cost is the abandonment of those whom the court has an obligation to protect.[3] As an example, in the case now before this Honorable Court, the cost is the abandonment of police officers to what can only be described as assassination. In the case of Robert Tate Kasold, of immediate interest to amicus, in its quest for judicial integrity the court abandoned immature children such as the retarded, seven-year-old victim who could *never* fulfill the obligation imposed upon her by the district court — to have adequately described the crime committed against her as soon as it had happened. See *State v. Kasold*, 110 Ariz. at 561-562, 521 P.2d at 993-994. This Honorable Court has recognized the right, if not the duty, to protect the moral and emotional welfare of its children.[4] Surely that obligation to protect the helpless is another facet of judicial integrity that must be considered before the court may take satisfaction in its abstention in the name of "clean hands". In the words of

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[3]Schrock suggests that the courts, in following the rationale may be taking satisfaction in their own purity in the midst of "squalid and frightening crime"; [that the social judgment that the policeman's conduct is more reprehensible than that of the defendant in a particularly offensive crime may not be the ultimate social judgment, see Schrock, supra, note 2, at 265-267]. Barrett, *Exclusion of Evidence Obtained by Illegal Searches*, 43 Calif.L.Rev. 565, 582 (1955).

[4]*Prince v. Massachusetts*, 321 U.S. 158, 166-67 (1944); *Stanley v. Illinois*, 405 U.S. 645, 650-652 (1972).

Chief Justice Burger:

> ". . . we may have come full circle from the place where Brandeis stood, and that a vast number of people are losing respect for law and the administration of justice because they think that the Suppression Doctrine is *defeating* justice."[5]

Amicus submits that with decisions such as *Kasold*, the convolution of the principles expressed in *Mapp v. Ohio* is complete: the exclusionary rule is now being applied in cases when a court expressly finds the absence of police misconduct, and the rule's mere application itself tends to lessen the integrity of every court in the land. *Mapp* has been stood on its head and the prophesy of *Terry v. Ohio* has come true: "a rigid and unthinking application of the exclusionary rule, in futile protest against practices which it can never be used effectively to control, may exact a high toll in human injury and frustration of efforts to prevent crime". 392 U.S. at 15.

Amicus submits that in order to rectify situations such as those exemplified by *Kasold*, this Court need not take the drastic step of overruling *Mapp v. Ohio*. Instead, the Court need only to make clear to all inferior courts in this land that its discussions of the exclusionary rule in *Calandra, Tucker* and *Peltier, inter alia*, are in complete harmony with the original intent of *Mapp* and that the exclusionary rule should be applied only when such application will (1) deter future police misconduct, or (2) safeguard the imperative of judicial integrity. Rigid and unthinking application of the rule must be condemned in strong, unequivocal language.

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[5]Burger, *Who Will Watch the Watchman?*, 14 Am.U.L.Rev. 1, 22 (1964).

Lastly, amicus suggests that in order to clearly apprise every American court of its duty when reviewing Fourth Amendment search and seizure claims, this Honorable Court should unequivocally commit itself to the standard adopted in *United States v. Peltier:* "If the purpose of the exclusionary rule is to deter unlawful police conduct, then evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment." 43 L.W. at 4922.

Amicus submits that the *Peltier* standard realistically returns search and seizure law to a position where the legitimate interests of society and the rights of all citizens to be free from unreasonable search and seizure can each be properly protected.

ARGUMENT

II

A State Prisoner, Who Has Been Afforded a Fair Opportunity in the State Courts to Raise and Have Adjudicated His Fourth Amendment Claims, Should Not Be Allowed to Raise Those Same Claims in Collateral Proceedings in the Federal Courts. All Too Often Collateral Review Devolves Into Nothing More Than a Substitution of a Single District Judge's Opinion For That of the Entire State Judiciary System. The Case of Robert Tate Kasold Amply Demonstrates Why *Kaufman v. United States*, 394 U.S. 217 (1969) Should Be Overruled.

Although amicus chooses not to reargue the position ably advanced by petitioner Wolff, the State of Arizona urges that this Honorable Court adopt in its entirety the "detailed and persuasive" concurring opinion of Mr. Justice Powell in *Schneckloth v. Bustamonte*, 412 U.S. 218, 250 (1973). In so doing, this Court must of necessity overrule or limit some of its earlier precedents, especially the dicta of *Kaufman v. United States*, 394 U.S. 217, 225-226 (1969).

A close examination of the opinions of this Honorable Court suggests that *Kaufman* no longer expresses the opinion of a majority of the justices. Both the Chief Justice and Mr. Justice Rehnquist joined Mr. Justice Powell in his *Schneckloth* concurrence. Mr. Justice Blackman's separate concurrence, 412 U.S. at 249, expresses his agreement with Mr. Justice Harlan's *Kaufman* dissent, 394 U.S. at 242, and with "nearly all" of Mr. Justice Powell's *Schneckloth* opinion. Finally, even though Mr. Justice Stewart authored the majority

opinion in *Schneckloth*, he had previously joined in the aforementioned *Kaufman* dissent of Mr. Justice Harlan. A simple exercise in counting reveals that five sitting justices of this Honorable Court are on record as favoring the limitation or overruling of *Kaufman's* statement that state prisoners' may assert Fourth Amendment claims in seeking federal habeas corpus relief pursuant to 28 U.S.C. § 2254.

Amicus submits that for the reasons expressed by Mr. Justice Powell in *Schneckloth*, Fourth Amendment claims of state prisoners should not be held cognizable under the federal habeas corpus statutes, and amicus further submits that *Wolff v. Rice* is the proper vehicle for this Court's anti-*Kaufman* majority to put a stop to the mere substitution by a district judge of his opinion for that of the full bench of state supreme courts in search and seizure cases. The case of Robert Tate Kasold illustrates the problem.

In early January of 1973, a detective of the Phoenix, Arizona, Police Department presented an affidavit to a Maricopa County Justice of the Peace requesting that a search warrant be issued. (Pertinent portions of the affidavit are set out in the opinion of the Arizona Supreme Court, attached as Appendix B.) After studying the affidavit, the magistrate issued the warrant. The search of Kasold's apartment resulted in the seizure of between 500 and 600 photographs of a sexual nature, including photographs of both rape victims and the seven-year-old retarded child molestation victim.

At trial, Kasold moved for the suppression of the seized evidence, claiming that the affidavit failed to establish probable cause because the information supplied to the police was "stale". A suppression hearing

was held and after due consideration, the superior court judge denied the motion to suppress.

This same issue was presented to the Supreme Court of Arizona on appeal. The issue was fully briefed and argued before that court by counsel. The Arizona Court upheld the search, finding that the evidence sought — explicit sexual photographs which Kasold viewed for the purpose of sexual gratification — was not the type which would likely be thrown away or consumed in five months. The court distinguished this type evidence from consumables, clearly taking into consideration the unique nature of Kasold's crime. There is no other reported case similar to this one — it is unique on its facts. This is not a case of consumable or disposable items, almost certain to be disposed of during this time period (i.e., alcohol, drugs, stolen property, gems). Kasold took photographs of himself and his victims by a delayed photographic technique. Why would anyone take such photographs? Given Kasold's propensities, common sense provides us with only one reason: to keep for sexual pleasure. The very purpose of a photograph is to keep, to memorialize an event. Photographs are simply not made to be destroyed, especially photos of this personal an ilk.

After the affidavit was fully and fairly tested by three separate levels of the Arizona court system (Justice Court, Superior Court and Supreme Court), Kasold raised the issue anew in a federal habeas proceeding. On this fourth review of the affidavit, he found a sympathetic ear. After conducting an evidentiary hearing, see *Townsend v. Sain*, 372 U.S. 293 (1963), the United States District Court for the District of Arizona ordered that Kasold's child molestation conviction be vacated. The federal district judge based his decision upon his

finding that the information contained in the affidavit was "stale". See Appendix C. In so ruling, the district court chose not to address the Arizona Supreme Court's finding that the unique nature of the photographs made it unlikely that the evidence would be outside of Kasold's possession. Furthermore, the district court chose to ignore the fact that the Fourth Amendment's protection is afforded to people, not places. *Katz v. United States*, 389 U.S. 347 (1967).

Amicus is not attempting to argue the merits of the *Kasold* case to this Honorable Court, although such an argument may be made in the future. Rather, amicus is attempting to demonstrate that on an extremely close question of law, and in a case where there exists no adequate legal precedents to guide the courts on the precise question presented, the United States District Court becomes, in effect, a court of both first and last resort. This is so for the following reasons.

Under Arizona law, a reviewing court will sustain a judicial determination of probable cause so long as there existed a "substantial basis" for that conclusion. *State v. Endreson*, 109 Ariz. 117, 506 P.2d 248 (1973). The reviewing court is not allowed to reevaluate the probable cause issue anew.

Yet, when the district court considers the existence or lack of probable cause, it is bound by no restraints of prior state court findings. *Townsend v. Sain*, supra; *Fay v. Noia*, 373 U.S. 391 (1963). Assuming that the federal district court holds contra to the decision of the state supreme court, and further assuming that the issue is indeed very, very close, the district court decision will stand, because the standard applied in federal appellate review is that of "clearly erroneous". Fed. R. Civ. P.

52(a). By definition, a district judge's decision cannot be clearly erroneous on a close legal question.

The result is clear: in a case such as Kasold's, it is the opinion of one United States District Judge which counts. Decisions of state courts are of no import; appeals in the federal system are futile. The district judge may as well be the magistrate to whom all search warrant applications are submitted because his is the ultimate decision. Such a circumstance is intolerable under our federal system; it makes a mockery of this Honorable Court's belief in "the coequal responsibilities of state and federal judges in the administration of federal constitutional law . . ." *Townsend v. Sain*, 372 U.S. at 314-315. Mr. Justice Powell's comments concerning the effect of collateral review on the state judicial system are pertinent, *Schneckloth v. Bustamonte*, 412 U.S. at 259-271 (Powell, J., concurring), particularly since those comments prove Mr. Justice Clark to be a prophet, *Fay v. Noia*, supra, 372 U.S. at 445-448 (Clark, J., dissenting). See also M. Fleming, THE PRICE OF PERFECT JUSTICE (1974), p. 22-36.

Moreover, *Kaufman* should be overruled for another basic reason. Again, it must be kept in mind that the primary purpose of the exclusionary rule is to deter police misconduct and that a secondary purpose is to protect the imperative of judicial integrity. This Court has consistently refused to apply the exclusion sanction when these purposes would not be served. *United States v. Calandra*, supra; *Michigan v. Tucker*, supra; *United States v. Peltier*, supra; *Harris v. New York*, supra. In a § 2254 proceeding, neither rationale is served by invoking the exclusionary rule.

Mr. Justice Powell has adroitly explained why the

deterrent purpose is inapplicable in a collateral proceeding:

> "Whatever the rule's merits on an initial trial and appeal * * * the case for collateral application of the rule is an anemic one. On collateral attack, the exclusionary rule retains its major liabilities while the asserted benefit of the rule dissolves. For whatever deterrent function the rule may serve when applied on trial and appeal becomes greatly attenuated when, months or years afterward, the claim surfaces for collateral review. The impermissible conduct has long since occurred, and the belated wrist slap of state police by federal courts harms no one but society on whom the convicted criminal is newly released." *Schneckloth v. Bustamonte*, 412 U.S. at 268-269 (Powell, J., concurring).

The judicial integrity rationale is even less applicable in a § 2254 proceeding, for if a state judicial system retains any province which is free from federal intervention, it is the right to determine for itself when its own integrity has been compromised. The federal courts should play no role in making such a determination.

Amicus submits that for all the foregoing reasons, and for those reasons set forth in the brief of petitioner Wolff, to the extent that *Kaufman v. United States* authorizes federal district courts to consider the Fourth Amendment claims of state prisoners brought in habeas actions, that case should be overruled.

Conclusion

Courts at all levels have lost sight of the essence of the decision in *Mapp v. Ohio* and are invoking the ex-

clusionary rule in an indiscriminate manner. This Honorable Court should take this opportunity to insure that the exclusion sanction is applied only when its purposes of deterrence of police misconduct and the safeguarding of judicial integrity will be served.

Furthermore, no legitimate purpose is served by allowing state prisoners to relitigate Fourth Amendment claims in federal habeas corpus proceedings.

Legitimate interests in harmonious federal-state relations, in the finality of state criminal convictions, and ultimately, in the continued viability of state criminal courts themselves, are not being served.

American criminal justice will be greatly improved if the current broad applicability of the exclusionary rule is reduced to conform to the original dictates of *Mapp*, and if *Kaufman* is overruled. The State of Arizona, as amicus curiae, respectfully requests that these steps be taken and that the judgment below in No. 74-1222 be reversed.

Respectfully submitted,

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APPENDIX A

IN THE
SUPREME COURT OF THE STATE OF ARIZONA
In Division

The State of Arizona,
Appellee,
vs.
Robert Tate Kasold,
Appellant.

No. 2818

Appeal from the Superior Court of Maricopa County
Cause No. CR-74621
The Honorable Frederick W. Heineman, Judge

JUDGMENT AFFIRMED

Gary K. Nelson, The Attorney General — Phoenix
By Shirley H. Frondorf, Special Assistant Attorney General
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CAMERON, Vice Chief Justice

This is an appeal from a jury verdict and judgment of guilt to the crime of molestation of child, § 13-653 A.R.S., and a sentence thereon of not less than twenty years nor more than life imprisonment.

We are asked to consider four questions on appeal:

1. Did the trial court commit reversible error in denying defendant's motion to suppress the fruits of a search warrant?
2. Was there improper foundation for the admission of some thirteen photographs?
3. Did the court commit error in denying the defendant's motion to hold a competency hearing on the question of the victim's ability to testify?
4. Does the evidence support the verdict and judgment?

The facts necessary for a determination of this matter on appeal are as follows. Sometime during the month of July, 1971, while the defendant's wife and family were away on vacation, the defendant took a series of photographs, with the help of a self-timer, of the defendant and a mentally retarded neighborhood girl, then eight years old. The photographs show the defendant and the neighbor girl in various poses, one in which the little girl is watching cartoons on TV while the defendant is kneeling behind her fondling his private parts. There are three photographs of the little girl seated on the floor in the defendant's living room while the defendant stands over her and appears to be masturbating. Three photographs have them seated next to each other on the couch with the defendant's private parts exposed through his open fly. During all of this time the defendant was dressed in a pair of cutoff shorts. Two photographs show the defendant seated on the floor near the couch with his private parts exposed and the defendant appears to be rubbing the private parts of the little girl, although the little girl is dressed and the defendant has his hand on her shorts. Three other photographs show the little girl

standing on her head with her legs spread apart and the defendant standing above her with his penis pointed to, but not touching, her private parts or clothing. The last photograph in the evidence shows the defendant with his pants around his knees, his private parts exposed, and the little girl doing a headstand in front, facing backwards, and he is holding her legs spread apart. In all of the photographs the victim is clothed.

This is a companion case to State v. Kasold, No. 2819, filed this day. As a result of the search warrant in the companion case, the police obtained the roll of undeveloped film. When the film was developed, the police were able to identify the victim as a neighbor girl. Motion to suppress was denied, and the pictures were admitted into evidence based upon the testimony of the victim's mother. The defendant testified on his own behalf and admitted the taking of the pictures contending:

"A Are you asking my intent in taking the photographs? What I was trying to accomplish?

"Q That is precisely what I am asking you.

"A I thought that it would be a challenge to take photographs in which I would be exposed without the knowledge of the other person present. And —

"Q When you say 'exposed' you mean sexually exposed?

"A Yes.

"Q All right, go on.

"A It was not my intention that anybody ever should see that. Certainly not Mona, at that time, on that day, and certainly not the people

who have since seen these photographs.

It became sort of a contest, I suppose. The camera was there and it was loaded.

I had no intention of nor did I harm Mona in any way either mentally or physically, but it became, I suppose, sort of a private act of exhibitionism. I never made these photographs. I never processed the film. It was never my intention that anyone else would ever see what took place that day, but, as Mr. — as the prosecutor has said, the camera did a faithful job."

The defendant contended that at all times during the taking of the pictures that the victim never saw him exposed. Defendant also denied that he ever touched the private parts of the body of the victim. For example:

"Q Would you explain that to the jury, please?

"A I don't understand.

"Q What was your purpose in putting your left hand between Mona's legs?

"A Well, I had taken by that time nine previous exposures and I had a 20-exposure roll of film. I realized I couldn't shoot anything else on that roll of film. I wasn't going to mix lighting in this, anything like this, and I guess I was running out of poses. This is to simulate some sort of sexual gesture, I suppose.

'Q In that photograph is your hand in fact touching the private parts of —

"A No. If I had touched her I would have drawn her attention.

"Q How close did you come to touching her?

"A I suppose an inch or so, maybe, two, depending on the parts of my hand, probably about like this (indicating)."

The victim was called but not allowed to testify. The jury was also instructed on the offense of contributing to the delinquency of a minor (§ 13-822 A.R.S.), but the jury returned a verdict of guilty as charged.

Search and Seizure

We have discussed the matter of the search warrant in the companion case of State v. Kasold, No. 2819, filed this day, and have held that the search warrant was a proper warrant, and the items seized thereunder were admissible. It makes no difference that the information obtained leads to a different crime than that which the officers believed to have taken place when the search warrant was obtained. State v. McMann, 3 Ariz. App. 111, 412 P.2d 286 (1966).

Admission of the Photographs

We find no error in the admission of the photographs despite the defendant's claim of lack of proper foundation. The mother was able to identify both the victim and the defendant, and the jury was able to identify the defendant from the pictures. The defendant described himself as an amateur photographer and we believe that his pictures accurately portray what he intended them to portray. We find no error.

Testimony of the Victim

The defendant, testifying in his own behalf, stated:

"Q You are telling the jury you are innocent of this charge, is that right?

"A Yes, I am.

"Q Are you telling the truth?

"A Yes, I am.

There are two people who can testify as to what happened that day, the so-called victim, Mona, and myself, the defendant.

I don't know why Mona hasn't testified. I know it is not because she is too mentally retarded, because I have talked with her many times and she is perfectly capable of expressing her thoughts and her recollections.

On the other person, I am the other person and, of course, I am the defendant. I requested a lie detector test to verify that I am telling the truth as I understand it."

At the conclusion of the defendant's case, the prosecutor indicated his desire to call Mona Whiting to the witness stand in rebuttal. Defendant's counsel objected to the girl being called into the courtroom at all, and asked that a preliminary hearing in chambers be held to determine the girl's competency to testify as a witness. The record reflects the following:

"MR. McDONALD: Yes, Your Honor, the State has rebuttal. The first witness the State would call would be Mona Whiting.

(Mona Whiting entered the courtroom and went to the Clerk's desk but would not be sworn when requested by the Clerk.)

"THE COURT: Ladies and gentlemen, we will take a short recess.

(Court was recessed at 2:55 p.m. and the following proceedings took place outside of

chambers immediately thereupon, with the Court, Mr. McDonald and Mr. Kemper present:)

"MR. KEMPER: I would like the record to reflect Mr. McDonald is here to agree or disagree with me that the girl was brought into the courtroom after her name was called, that she was in the company of her father, that she was clutching him with her arm around his waist and apparently his arm was around her shoulder, that she was taken to the Clerk's stand to be sworn in, and I personally did not hear her say anything, although I heard Mr. Cioni try to talk to her. The Judge was in front of her, maybe he heard something, but it seemed to me it was so highly prejudicial we would move for a mistrial. We feel that the defendant cannot get a fair trial if this girl is dragged into the courtroom like an exhibit or something.

"MR. McDONALD: My response —

"MR. KEMPER: This all could have been avoided by having the hearing we asked for in the first place and that was the purpose of it.

We would ask the Court grant a mistrial.

"MR. McDONALD: In response, I was advised prior to bringing that girl into the courtroom today, and I would avow to the Court, by the girl's mother, that during their conversations over the weekend, since Friday, the little girl had indicated to her mother that if the occasion arose that she were to take the stand and give testimony, that she would by a nod of the head designate whether the defendant had touched her.

Prior to going in there today, it was my belief that

the girl would at least go and raise her hand, assume the witness stand. However, I think that the point in her not going in there is not prejudicial. The trial judge witnessed the entire incident. I think that it effectively impeaches what the defendant's own statements were, made in the presence of the jury during his testimony, that this little girl was competent to come in and state the other side of the story.

"THE COURT: Anything else you want to add?

"MR. KEMPER: No.

"THE COURT: Mona's first appearance in court did not indicate she could not testify. The testimony of the witnesses indicates that she probably could testify.

Her conduct moments ago indicated a very frightened, very shy, little girl, and I will proceed with the competency hearing out of the presence of the jury to determine whether or not she really can testify to the facts in issue.

The motion of the defendant for a mistrial is denied."

After the competency hearing in chambers, the court determined that the little girl should not be allowed to testify.

Our statutes state:

"The following shall not be witnesses in a civil action:

* * *

"2. Children under ten years of age who appear incapable of receiving just impressions of the facts respecting which they are to testify, or of relating

them truly." § 12-2202 (2) A.R.S.

And:

"The laws for determining competency of witnesses in civil actions are also applicable to criminal actions and proceedings, except as otherwise provided by this chapter." § 13-1801 A.R.S.

Rule 43 (c) of the Rules of Civl Procedure, 16 A.R.S., reads as follows:

"Examination by court as to disqualifications. When a child under ten years of age, or person apparently of weak intellect, is called as a witness, the court may examine him to ascertain his capability, and whether he understands the nature and obligation of an oath."

Although Rule 43 (c) would appear to provide that a child under ten years of age may be called as a witness before the court conducts a competency hearing, as was done here, we believe the order in which this occurs is left to the discretion of the trial judge. In State v. Harris, 107 Ariz. 41, 481 P.2d 504 (1971), we impliedly approved the procedure of conducting the hearing out of the presence of the jury before ruling that the witness could be called. In the instant case the witness was called first and under Rule 43 (c) we find no error. Also, the defendant contended on the stand that the witness was capable of testifying as to the facts indicated, and it was proper to allow the jury to at least see the witness and her demeanor to ascertain themselves whether or not the witness could testify as the defendant contended she would have been able to do. We find no error.

Sufficiency of the Evidence

The defendant at oral argument raised the question of

the sufficiency of the evidence to support a conviction for child molestation. The testimony of the State is unique in that it consisted of the introduction of the photographs of the defendant, plus some foundational material which went to the identity of the victim and her mental state. Thus, the only evidence upon which the conviction is based are the photographs previously described.

In at least four of the photographs the jury could believe that there was a touching of the private parts of the victim through her shorts, and in at least several of the other pictures the victim would most certainly have seen the defendant exposed. It is contended by the defendant that neither of these things happened. We believe that the jury was able to reasonably infer from these pictures that the defendant did in fact commit the acts for which he was charged, and that the court properly denied the motion for directed verdict at the end of the State's case as well as the motion for acquittal. We cannot restrain ourselves from stating that this is a case in which one picture is worth a thousand words.

Judgment and sentence affirmed.

APPENDIX B

IN THE
SUPREME COURT OF THE STATE OF ARIZONA
In Division

The State of Arizona,
Appellee,
vs.
Robert Tate Kasold,
Appellant.

No. 2819

Appeal from the Superior Court of Maricopa County
Cause No. CR-74620
The Honorable Frederic W. Heineman, Judge

SENTENCES AFFIRMED

Gary K. Nelson, The Attorney General — Phoenix
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Attorneys for Appellee

Derickson & Kemper — Phoenix
By James Hamilton Kemper
Attorneys for Appellant

CAMERON, Vice Chief Justice

This is an appeal from sentences only after jury verdicts and judgments of guilt to six counts of rape, second degree, § 13-611 (B), as amended 1962, and § 13-614 (B) A.R.S., together with sentences as to each count of not less than fifteen years nor more than life, all sen-

tences to run concurrently.

We need consider only one question on appeal and that is whether the search of the defendant's premises was made as a result of a constitutionally infirm search warrant.

The facts necessary for a determination of this matter on appeal are as follows. In December of 1972, a female student at North Phoenix Union High School in Phoenix, Arizona, told school authorities that during the previous spring she and another student had engaged in sexual activities with the defendant, Robert Kasold, an English teacher at the high school. The school authorities interrogated the other student and the police were called to conduct a further investigation. On the 2nd day of January, 1973, an affidavit in support of a request for a search warrant was filed with Justice of the Peace Al Flood. The affidavit, after describing the name of the defendant and the places to be searched (the apartment and the automobile), contained the following:

"That the following facts establish probable cause for believing that grounds for the issuance of a search warrant for the aforementioned items exist:

"Two 17 year old female students from North Phoenix High School have revealed that they were sexually involved with MR. ROBERT KASOLD, a teacher at the school. Their involvement lasted from March until July, 1972. During this time the suspect took numerous photographs of the victims and himself in sexual activity.

• • •

"Between the dates *December 20* and *December 21, 1972*, the affiant learned the following information in the following manner:

"Your affiant is a Police Detective for the City of Phoenix Police Department assigned to the Crimes against Persons Detail, and has recently been involved in an investigation concerning illicit sexual activity involving a high school teacher, Robert Kasold. During the course of this investigation your affiant personally interviewed two 17 year old females who are students at North Phoenix High School where Mr. Kasold is employed as a teacher.

"Both of these young girls told your affiant that they had been engaged in sexual activities with Mr. Kasold. This activity included heterosexual intercourse, fellatio, cunnilingus and sodomy. This activity took place in a house trailer located in the 1600 block East Thomas, in Mr. Kasold's classroom and in his vehicle. During these periods of sexual activities, Mr. Kasold took photographs depicting the activity, in addition Mr. Kasold caused these two students to write stories concerning their sexual life.

"Frequently during the sexual activity Mr. Kasold used a blue and white vibrator to stimulate the girls sexually.

"Also during some of the periods of sexual activity the girls themselves took photographs. Some of these photographs were removed by the girls and subsequently shown to a classmate.

"These girls further told your affiant that Mr. Kasold keeps some of the photographs in his classroom. He keeps others in his vehicle and others in his apartment located at 5105 North 40th Street, Apt. E-425.

"During the course of this investigation, your affiant

has personally determined that Mr. Kasold is, in fact, a teacher employed by North High School and that he does in fact now reside at 5105 North 40th Street, Apt. E-425, and further that Mr. Kasold possesses a vehicle that is a 1968 Citron bearing Arizona license MMD-942.

"Further investigation into this matter by your affiant has revealed that prior to this time Mr. Kasold's activity as it relates to dealing with his students has been the subject of concern by various school administrators and that he has been the subject of psychological counselling.

"Further investigation has revealed that Mr. Kasold has spent an unusually large amount of time engaging in extra-curricular activities with the students.

"Your affiant has personally spent several hours in meticulously examining statements given by these two females and feels confident that the allegations by the girls in this matter are true.

"On 1/2/73 one of the young girls was examined by means of a polygraph regarding the above allegations. The results of this polygraph indicate that she has been truthful in her statements.

"Investigation also revealed that suspect has written stories about his sexual activity and has pursuaded the young girls to write stories describing their sexual activity. This writing is believed to be in the possession of the suspect at this time."

As the result of the search warrant, between 500 and 600 photographs of a sexual nature, as well as books and other sex-related paraphernalia were obtained. Included in the photographs were pictures of the two victims involved in this particular case, as well as a role of film upon which the conviction of the defendant in the companion case, State v. Kasold, No. 2818, filed this day, was based.

The defendant made a timely motion to suppress all of these items based upon the ground that the seizure was an unlawful search and seizure in violation of the Fourth and Fourteenth Amendments to the United States Constitution as interpreted by the United States Supreme Court. Specifically, defendant contends that the affidavit did not state probable cause and also that such information that it did contain was stale, being over five months old. The motion to suppress was denied.

The items contained in the search warrant were not introduced during the trial of the case, that case being determined primarily by the testimony of the two victims, but was used during the hearing in mitigation and aggravation over the objections of the defendant and formed the basis of the judge's sentences which were imposed in this case.

We have read the affidavit as set forth in this opinion. We believe that the affidavit states probable cause upon which to base the issuance of a warrant. Our Court of Appeals has stated:

> "The United States Supreme Court has laid down a two-pronged test for evaluating whether or not probable cause exists to issue a warrant. (citations omitted) The magistrate must be presented with (1) facts showing the informant is reliable and (2) the underlying circumstances on which the substance of the 'tip' is made. And, as further clarified in *Spinelli*, supra, the magistrate must generally assure himself that the information is not merely based

upon casual rumor or the individual's general reputation." State v. Ramos, 11 Ariz. App. 196, 199, 463 P.2d 91, 94 (1969).

Defendant, while admitting that the girls were reliable, contends that the affidavit does not set forth sufficient facts upon which the magistrate could assure himself that the evidence was probably in the place to be searched. We disagree.

In the instant case, not only do the girls appear to be reliable, one girl having submitted to a polygraph test to determine her reliability, but the underlying circumstances upon which the information was based appear to be equally reliable.

The two girls indicated that the defendant took their pictures and was in possession of these pictures, books, and written stories of their sexual activities. There was, we believe, sufficient information upon which the magistrate could find probable cause to believe that the evidence existed at the place to be searched.

Defendant further contends, however, that the information upon which the warrant was based was stale and therefore the magistrate did not have probable cause to believe that the evidence would still be there after more than five months. We do not believe, based upon the facts in the instant case, that the five month or more delay in the obtaining of the warrant makes the information obtained under the warrant subject to suppression. The authorities acted with dispatch as soon as the facts were made known to them. The evidence sought to be obtained was not the type which would likely be consumed or thrown away in the five months, such as alcohol, People v. Siemieniec, 368 Mich. 405, 118 N.W.2d 430, 100 A.L.R.2d 522 (1962); Terry v. State,

123 Ga.App. 746, 182 S.E.2d 513 (1971), or narcotics, Ashley v. State, 251 Ind. 359, 241 N.E.2d 264 (1968); State v. Ingram, 251 Ore. 324, 445 P.2d 503 (1968).

We agree with the United States Court of Appeals for the Fifth Circuit which upheld a search warrant based upon information more than six months old:

> "It is true that an affidavit used to support a search warrant 'must speak as of the time of the issue of that warrant'. Sgro v. United States, 1932, 287 U.S. 206, 211, 53 S.Ct. 138, 140, 77 L.Ed. 260, 263. See Rider v. United States, 5 Cir. 1966, 355 F.2d 192. There is, however, no arbitrary time limit on how old the information contained in an affidavit may be. ***" United States v. Guinn, 454 F.2d 29, 36 (5th Cir. 1972).

In the instant case, there were pictures of a sexual nature which it is reasonable to believe the defendant intended to keep. We do not believe that the staleness of the information indicates lack of probable cause, and the motion to suppress was properly denied. The items, being material, we admissible for the purpose of sentencing.

Even assuming, however, that the warrant was invalid, defendant may not prevail. In sentencing, a judge may consider information which might not be admissible at a trial, but which is certainly relevant for the purpose of sentencing, State v. Munoz, 110 Ariz. 419, 520 P.2d 291, No. 2855, filed 21 March 1974, and we have recently held that an item obtained as the result of an illegal search warrant may be used as a basis for sentencing. State v. Benge, 110 Ariz. 473, 520 P.2d 843, No. 2545, filed 4 April 1974.

Sentences affirmed.

APPENDIX C

IN THE

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

Robert Tate Kasold, *Petitioner,* *vs.* Harold Cardwell, Warden, Arizona State Prison, *Respondent*	No. CIV 74-541 PHX - CAM

IT IS HEREBY ORDERED that this Court having received and considered petitioner's petition for writ of habeas corpus dated August 7, 1974; and having received and considered the respondent's response to said petition dated September 20, 1974; and having on April 7, 1975, considered the evidence and oral argument relating to the petition in a hearing coming regularly before this Court, finds that the petition should be granted.

The relevant facts are agreed upon by petitioner and respondent. In December of 1972, a female student at North Phoenix High School in Phoenix, Arizona, reported to school officials that she had earlier had sexual relations with petitioner, Robert Tate Kasold, who at that time was a teacher at the school. The female student reported that another female student had also had sexual relations with petitioner. Both of the female students were under eighteen years of age at the time of the reported incidents. School officials relayed this information to the Phoenix Police Department and a detective conducted an investigation and interviewed

both of the girls involved. On January 2, 1973, the detective went before a magistrate to secure a search warrant on the basis of the following affidavit:

> "Two 17 year old female students from North Phoenix High School have revealed that they were sexually involved with Mr. Robert Kasold, a teacher at the school. Their involvement lasted from March until July, 1972. During this time the suspect took numerous photographs of the victims and himself involved in sexual activity.
>
> Your affiant is a police detective for the City of Phoenix . . . and has recently been involved in an investigation concerning illicit sexual activity involving a high school teacher, Robert Kasold. During the course of this investigation, your affiant personally interviewed two 17 year old females who are students at North Phoenix High School where Mr. Kasold is employed as a teacher.
>
> Both of these young girls told your affiant that they had been engaged in sexual activities with Mr. Kasold. This activity included hetrosexual (sic) intercourse, fellatio, cunnilingus and sodomy. This activity took place in a house trailer located in the 1600 block of East Thomas, in Mr. Kasold's classroom and in his vehicle. During these periods of sexual activity, Mr. Kasold took photographs depicting the activity, in addition Mr. Kasold caused these two students to write stories concerning their sexual life. Frequently during the sexual activity, Mr. Kasold used a blue and white vibrator to stimulate the girls sexually.
>
> Also during some of the periods of sexual activity, the girls themselves took photographs. Some of

these photographs were removed by the girls and subsequently shown to a classmate.

These girls further told your affiant that Mr. Kasold keeps some of the photographs in his classroom. He keeps others in his vehicle and others in his apartment located at 5105 North 40th Street, Apartment E-425.

During the course of this investigation, your affiant has personally determined that Mr. Kasold is, and in fact, a teacher employed by North Phoenix High School and that he does, in fact, now reside at 4105 North 40th Street, Apartment E-425, and further that Mr. Kasold possesses a vehicle that is a 1968 Citron (sic) bearing Arizona License MMD-942.

Further investigation into this matter by your affiant has revealed that prior to this time Mr. Kasold's activity as it relates to dealing with his students has been the subject of concern by various school administrators and that he has been the subject of psychological counselling.

Further investigation has revealed that Mr. Kasold has spent an unusually large amount of time engaging in extracurricular activities with the students.

Your affiant has personally spent several hours in meticulously examining statements given by these two females and feels confident that the allegations by the girls in this matter are true.

On January 2, 1973, one of the young girls was examined by means of a polygraph regarding the above allegations. The results of this polygraph indicate that she has been truthful in her statements.

Investigation also revealed that suspect has written stories about his sexual activity and has pursuaded (sic) the young girls to write the stories describing their sexual activity. This writing is believed to be in the possession of the suspect at this time."

Proceeding on the basis of a search warrant issued on the above affidavit, police officers, on the same date the warrant was issued (January 2, 1973), searched petitioner's apartment and seized photographs, books and magazines, a roll of film, and other items. All of the items seized dealt with sex.

Petitioner was involved in two separate trials in the state court, where the evidence in question was used. In the child molestation trial, Maricopa County Superior Court Cause No. CR-74621, the evidence seized under the warrant was used at trial and was essential to the basis of the conviction. The sentence imposed in the child molestation trial was not less than twenty years, nor more than life imprisonment. In the second degree rape trial, Maricopa County Superior Court Cause No. CR-74620, the evidence was not used at trial, however, it was used at petitioner's aggravation/mitigation hearing, and petitioner was sentenced to not less than fifteen years, nor more than life imprisonment on each of six counts — the sentences to run concurrently. The Arizona Supreme Court affirmed petitioner's child molesting conviction in *State v. Kasold*, 521 P.2d 990 (1974); and petitioner's second degree rape conviction in *State v. Kasold*, 521 P.2d 995 (1974), thereby upholding the search here in question.

Petitioner, at all appropriate times, moved to suppress the evidence seized claiming that the search was legally infirm since the warrant was not issued on a showing of

probable cause. Petitioner's primary claim is that the affidavit presented to the magistrate related information which was observed by the female students at least five months prior to the issuance of the warrant, and that, therefore, the observations were too stale to constitute probable cause. Petitioner also claims that because he had changed his residence since the girls observed the evidence, this change of location worked against a finding of probable cause, i.e., the girls had not observed the evidence in the apartment where the petitioner lived at the time of the search.

In the hearing on the motion to suppress in the state court, the detective who had presented the affidavit to the magistrate testified as to some information that he had related to the magistrate which was not in the affidavit. R.T. Vol. 1 at 13-18. It is undisputed that this other information before the magistrate was not recorded. The Supreme Court of the State of Arizona in *The State of Arizona v. Delma Robertson* (No. 3079-PR) filed February 24, 1975, held that under A.R.S. § 13-1444(c), if information in addition to that in a signed affidavit is to be considered by a magistrate for making a determination of probable cause, it must be under oath and it must be recorded. The court made it clear that this is not a new interpretation of the law and recognized that this law became effective August 13, 1971, which would cover the events of this case. Therefore, the search must stand or fall on the affidavit. Even if the unrecorded information were considered, there would still be an absence of probable cause since this information doesn't relate to sexual activity, photographs depicting sexual activity, or anything else which can objectively be connected with the warrant in this case.

The parties have agreed that the police did not sit on

the information once received. The police acted with dispatch in securing a warrant when they were given the information. Thus, there is no allegation or evidence of police misconduct. Therefore, the primary issue here is whether the information upon which the search warrant was based was too stale to constitute probable cause. The observations of the female students were over five months old, i.e., from the last time the girls saw the items sought to be seized until the time of the search.

Petitioner brings numerous cases to the Court's attention on the issue of whether stale information can support a search warrant. *See* Annot, 100 A.L.R. 2d 525 (1965). In *Durham v. United States*, 403 F.2d 190, 193 (9th Cir. 1968), the court held:

> "The most convincing proof that the property was the possession of the person or upon the premises of some remote time in the past will not justify a present invasion of privacy. There must be reasonable grounds for believing that the immediate search for which authority is sought may be fruitful."

The Court in *Durham, supra,* in Footnote 6, stated:

> "The length of the time lapse alone is not controlling since even a brief delay may preclude an inference of probable cause in some circumstances while in others a relatively long delay may not do so. Nonetheless, there are obviously some limits. In Schoeneman v. United States, 115 U.S. App.D.C. 110, 317 F.2d 173, 177 (1963), Judge Wright noted 'that the Government could cite, and we could find, no case which sustained a search warrant issued more than 30 days after finding of the evidence which constituted the basis for the search.' It has

> also been stated that 'a lapse of more than 7 weeks has always rendered the search warrant nugatory.' Annot., 100 A.L.R.2d 525, 527 (1965)."

The case of *United States v. Neal*, 500 F.2d 305, 309 (10th Cir. 1974), held:

> "The Fourth Amendment contemplates that probable cause for the issuance of a search warrant must exist at the time the search is sought to be made. Probable cause existing at some time in the past will not suffice unless circumstances exist from which it may be inferred that the grounds continued to the time the affidavit was filed."

Therefore, the affidavit must be examined to determine whether there are facts therein stated "from which it may be inferred that the grounds (for the search) continued to the time the affidavit was filed." A fair reading of the affidavit reveals no facts from which it may be inferred that the grounds for the search continued until the time the affidavit was filed. It is undisputed that probable cause for the search in question existed at some time in the past. This, however, is not dispositive of the issue before this Court, i.e., whether the affidavit contained facts which could support a present search of petitioner's premises. One paragraph of the affidavit states in a conclusional manner:

> "These girls further told your affiant that Mr. Kasold keeps some of the photographs in his classroom. He keeps others in his vehicle and others in his apartment located at 5105 North 40th Street, Apartment E-425."

The search in question is the search of petitioner's apartment at 5105 North 40th Street. There is nothing in the affidavit to indicate that the girls had even been to

petitioner's new address on North 40th Street, since the activities complained of occurred "in the 1600 block of East Thomas." Further, there are no facts to support the statement that petitioner kept certain photographs in his apartment. How was this knowledge obtained? When was it obtained? These are questions for which the affidavit provides no answer. When the privacy of an individual is to be invaded, vague statements and innuendo cannot take the place of specific facts which can be reviewed by an objective tribunal. *See Spinelli v. United States*, 393 U.S. 410 (1969), and *Aguilar v. Texas*, 378 U.S. 108 (1964).

Another paragraph in the affidavit states:

> "Further investigation into this matter by your affiant has revealed that prior to this time Mr. Kasold's activity as it relates to dealing with his students has been the subject of concern by various school administrators and that he has been the subject of psychological counselling."

The respondent would have this statement constitute a finding of a continuous course of conduct. The statement, however, lends no support for the search in question since it in no way deals with the specifics of this case. The statement is vague and relates nothing about petitioner's sexual activity or the photographs which were seized.

This Court is aware of the teachings of *United States v. Ventresca*, 380 U.S. 102 (1965), where the United States Supreme Court made it clear that courts reviewing the sufficiency of search warrants cannot demand "technical requirements of elaborate specificity once exacted under common law pleadings. . . ." In the facts at bar, however, this Court is not invoking a procedural

technicality, but is recognizing the absence of any information which could support the issuance of a search warrant at petitioner's residence on North 40th Street.

This Court does not intimate that there is an automatic cut off date from the time of observations upon which the search warrant is based until the issuance of the warrant, after which time there cannot be a finding of probable cause. The facts of this case, i.e., the long period of time between the observations and the issuance of the warrant; petitioner's move to another residence concerning which there was no evidence to cause a reasonable person to believe that the items sought were in that residence; the absence of specific facts to support a finding of a continuous course of conduct; and the vagueness of the warrant itself; all work against a finding of probable cause.

Therefore, the petition is hereby granted and the conviction in the child molesting case, Maricopa County Superior Court, Cause No. CR-74621, is set aside since it is not disputed that without the evidence seized, petitioner could not have been convicted.

IT IS FURTHER ORDERED that this case shall be remanded to the state courts for resentencing in Maricopa County Superior Court, Cause No. CR-74620, on the second degree rape offenses, in light of *Verdugo v. United States*, 402 F.2d 599 (9th Cir. 1968). The sentencing judge in the state court in petitioner's case testified as a witness in the hearing held by this Court that he did not think the evidence, herein held inadmissible, influenced his sentencing of petitioner in the statutory rape case. This Court believes that this matter should be remanded to the state courts for such proceedings as the sentencing court may wish to order,

so that the state court judge may reevaluate his sentence acting as a judge and not as a witness testifying in this Court. Furthermore, this Court does not consider it appropriate that the sentence in this case should be a matter for any judge to consider other than the original sentencing judge.

DATED: April 29, 1975.

C. A. MUECKE
United States District Judge